



September 4, 2002

Mr. Ken Johnson  
Assistant City Attorney  
City of Waco - Legal Services  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2002-4946

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 168041.

The City of Waco (the "city") received five requests for copies of information pertaining to an incident involving two teenagers who drowned. You state that you will make some responsive information available to one of the requestors. You claim, however, that the submitted information, or portions thereof, is excepted from disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We have considered the exceptions you claim and have reviewed the submitted information.

You claim that portions of the information at issue are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code.<sup>1</sup> We note that chapter 772 authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code are applicable only to an emergency 911 district established in accordance with chapter 772. *See* Open Records Decision No. 649 at 1-3 (1996). Section 772.118 applies to emergency communication districts for counties with a population over two million. Section 772.218 applies to emergency communication districts for counties with a population over 860,000. Section 772.318 applies to emergency communication districts for counties

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<sup>1</sup> Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. Section 552.101 encompasses information that other statutes make confidential.

with a population over 20,000. Subchapter E, which applies to counties with populations over 1.5 million, does not contain a confidentiality provision regarding 911 telephone numbers and addresses. *See* Health & Safety Code § 772.401, *et seq.* These particular sections make confidential the originating telephone number and address of a 911 caller that are furnished by a service supplier. *See id.* at 2. We also note, however, that these sections are only applicable to originating telephone numbers and addresses obtained by a 911 district's use of a service supplier's database. *See* Open Records Decision No. 649 at 2 (1996).

To the extent that the originating addresses and telephone numbers that we have marked were supplied by a 911 service supplier to an emergency 911 district that is subject to subchapter C of chapter 772 of the Health and Safety Code, then they are confidential under section 772.218 and, thus, must be withheld from disclosure under section 552.101 of the Government Code. However, if they were not provided by a 911 service supplier to an emergency 911 district subject to subchapter C of chapter 772, then they must be released to the requestor. Furthermore, any originating telephone numbers and addresses contained on the submitted audiotape related to a 911 call were not obtained by the 911 district's use of a service supplier's database. Accordingly, we conclude that the city may not withhold from disclosure any portion of the submitted audiotape pursuant to section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code. *See id.* at 3 (language of confidentiality provision controls scope of its protection); *see also* Open Records Decision No. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure).

You claim that the remaining information at issue is excepted from disclosure pursuant to section 552.103 of the Government Code. Section 552.103 provides in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code, § 552.103(a),(c). The city maintains the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or

reasonably anticipated on the date that the governmental body receives the request for information and (2) the information at issue is related to that litigation. *See University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *see also Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under section 552.103(a).

A governmental body must provide this office with "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture" when establishing that litigation is reasonably anticipated. *See* Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body's receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>2</sup> *See* Open Records Decision Nos. 555 (1990), 518 at 5 (1989) (litigation must be "realistically contemplated"). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. *See* Open Records Decision No. 452 at 4 (1986).

You state, and provide documentation which you assert demonstrates, that the requestors in this matter have made public statements and other suggestions which indicate that the city may become a party to civil litigation in this matter. After carefully reviewing your representations and this documentation, we do not agree that the city has demonstrated that litigation was reasonably anticipated by the city on the date that it received the request for purposes of section 552.103. Accordingly, we conclude that the city may not withhold from disclosure any portion of the remaining information at issue pursuant to section 552.103 of the Government Code.

However, we note that the remaining information at issue contains e-mail addresses that are subject to section 552.137 of the Government Code. Section 552.137 makes certain e-mail addresses confidential and provides in pertinent part:

- (a) An e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under this chapter.
- (b) Confidential information described by this section that relates to a member of the public may be disclosed if the member of the public affirmatively consents to its release.

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<sup>2</sup> In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

Gov't Code § 552.137. Accordingly, we conclude that the city must withhold from disclosure the e-mail addresses that we have marked in the remaining information at issue pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release.

In summary, the city must withhold from disclosure the marked originating telephone numbers and addresses on the submitted CAD sheets pursuant to section 552.101 of the Government Code in conjunction with section 772.218 of the Health and Safety Code, if they were provided by a 911 service supplier to an emergency 911 district that is subject to subchapter C of chapter 772 of the Health and Safety Code. The city must withhold from disclosure the e-mail addresses that we have marked in the remaining information at issue pursuant to section 552.137 of the Government Code, unless the members of the public in question have affirmatively consented to their release. The city must release the entirety of the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

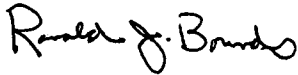
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental

body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds  
Assistant Attorney General  
Open Records Division

RJB/seg

Ref: ID# 168041

Enc. Marked documents

cc: Mr. Gregory E. Key  
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